Public Prosecutor v Syarikat Tekala Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO S–09–49 OF 2004
MOKHTAR SIDIN, MOHD GHAZALI AND TENGKU BAHARUDIN SHAH JJCA
27 AUGUST 2007

Constitutional Law — Constitution — Infringement of — Whether s 68 of the Employment Provident Fund Act 1991 and s 380(ii)(b) of the Criminal Procedure Code were ultra vires art 145(3) of the Federal Constitution and were void to that extent

Criminal Procedure — Prosecution — Conduct of prosecution under the Employment Provident Fund Act 1991 — Whether officer from EPF lawfully empowered to conduct prosecution — Federal Constitution art 145(3)

A complaint was made against the respondent in relation to offences under s 43(2) of the Employment Provident Fund Act 1991 ('the Act'), ie failure by an employer to pay monthly EPF contributions in respect of or on behalf of an employee. Pursuant to the complaint, a summons was issued by the magistrate and three charges were preferred against the respondent. The respondent claimed trial to the charges. Thereafter, four additional charges were preferred against the respondent and the respondent also claimed trial to these additional charges. An EPF officer conducted the prosecution of the case with a letter of authorization issued by the deputy public prosecutor pursuant to s 373 of the Criminal Procedure Code ('CPC'). Section 373 of the CPC came into force on 1 April 1998. All the charges related to offences alleged to have been committed before 1 April 1998. At the close of the respondent's case, a preliminary objection was raised that the prosecution of the case was ultra vires art 145(3) of the Federal Constitution and was null and void on the grounds that officers of the EPF do not have the authority to institute and conduct the proceedings. The magistrate held that the institution of the proceedings against the respondent for offences under the Act and the conduct of the prosecution was invalid and struck off the proceedings. The appellant appealed to the High Court. The High Court upheld the decision of the magistrate and dismissed the appeal. The appellant appealed to the Court of Appeal.

Held, dismissing the appeal:

(1) The prosecution's authority to institute and conduct the proceedings against the respondent in the magistrates court in the instant appeal were governed by s 380(ii)(b) of the CPC prior to its amendment by Act A1015 and s 68 of the Act prior to its deletion by Act A1080. The two provisions were ultra vires or inconsistent with art 145(3) of the Federal Constitution and hence by virtue

of art 4(1) of the Federal Constitution were void to the extent of their inconsistency. As such, the proceedings instituted and conducted by the EPF in the magistrate court was null and void (see para 54).

(2) The facts showed that the officer from the EPF laid a complaint before the magistrate. Upon taking cognizance of the offences under the Act, the magistrate issued a summons and consequently after service of the summons and upon the respondent pleading not guilty to the charges, the matter was fixed for trial. This process was tantamount to instituting and conducting criminal proceedings. Section 68 of the Act would be unconstitutional and invalid as being ultra vires art 145(3) of the Federal Constitution as it purports to clothe the person other than the Public Prosecutor, with the power to authorize the institution and conduct of prosecution under the Act. Thus, the prosecution made pursuant to s 68 of the Act is therefore null and void (see para 56).

(3) The amendments to the CPC by Act A1015 cannot apply in the instant appeal. Section 11 of Act A1015 clearly states that the amendments would not apply to any prosecution which had been instituted but had not yet been completed on the date of commencement of the Act. The issuance of the letter of authorization from the deputy public prosecutor to the EPF officer has no bearing upon the proceedings as the institution of proceedings was a nullity at the outset. The letter of authorization from the deputy public prosecutor cannot regularize what was a nullity at the outset (see para 57).

(4) The learned magistrate decided upon herself the issues arising from the preliminary objection which are actually questions as to the effect of provisions of the Federal Constitution without resorting to s 30 of the Courts of the Judicature Act 1964. Although s 30 does not seem to be a mandatory provision, this provision should always be resorted to by subordinate courts when faced with any question as to the effect of any provision of the Federal Constitution (see para 59).

[Bahasa Malaysia summary

Satu aduan telah dibuat terhadap responden berkaitan kesalahan-kesalahan di bawah s 43(2) Akta Kumpulan Wang Simpanan Pekerja 1991 ('Akta tersebut'), iaitu kegagalan oleh seorang majikan untuk membayar caruman bulanan KWSP berkaitan atau bagi pihak seorang pekerja. Berikutan aduan tersebut, satu saman telah dikeluarkan oleh majistret dan tiga pertuduhan telah dibuat terhadap responden. Responden memohon dibicarakan terhadap pertuduhan-pertuduhan tersebut. Selepas itu, tiga lagi pertuduhan telah dibuat terhadap responden dan responden juga memohon dibicarakan terhadap pertuduhan-pertuduhan tambahan itu. Seorang pegawai KWSP telah mengendalikan pendakwaan kes tersebut dengan satu surat pemberian kuasa yang dikeluarkan oleh penolong pendakwa raya menurut s 373 Kanun Acara Jenayah ('KAJ'). Seksyen 373 KAJ telah mula berkuat kuasa pada 1 April 1998. Kesemua pertuduhan berkaitan kepada kesalahan-kesalahan yang dikatakan telah dilakukan sebelum 1 April 1998. Di penutup kes responden, satu bantahan awal telah ditimbulkan bahawa pendakwaan kes tersebut adalah ultra vires perkara 145(3) Perlembagaan Persekutuan dan adalah terbatal dan tidak sah atas

alasan bahawa pegawai KWSP tidak mempunyai kuasa untuk memulakan dan mengendalikan prosiding. Majistret memutuskan bahawa prosiding yang dimulakan terhadap responden kerana kesalahan-kesalahan di bawah Akta tersebut dan perlakuan pihak pendakwaan adalah tidak sah dan telah membatalkan prosiding tersebut. Perayu telah mengemukakan rayuan ke Mahkamah Tinggi. Mahkamah Tinggi telah mengekalkan keputusan majistret tersebut dan menolak rayuan itu. Perayu telah merayu ke Mahkamah Rayuan.

Diputuskan, menolak rayuan tersebut:

(1) Kuasa pihak pendakwa untuk memulakan dan mengendalikan prosiding terhadap responden di mahkamah majistret dalam rayuan ini dikawal oleh s 380(ii)(b) KAJ sebelum pindaannya oleh Akta A1015 dan s 68 Akta tersebut sebelum pemotongannya oleh Akta 1080. Kedua-dua peruntukan tersebut adalah ultra vires atau tidak konsisten dengan perkara 145(3) Perlembagaan Persekutuan dan oleh itu menurut perkara 4(1) Perlembagaan Persekutuan adalah terbatal setakat sifat tidak konsistennya. Dengan itu, prosiding yang dimulakan dan dikendalikan oleh KWSP di mahkamah majistret adalah terbatal dan tidak sah (lihat perenggan 54).

(2) Fakta-fakta menunjukkan bahawa pegawai daripada KWSP telah mengemukakan aduan di hadapan majistret. Setelah mengambil perhatian terhadap kesalahan-kesalahan di bawah Akta tersebut, majistret telah mengeluarkan satu saman dan berikutan itu selepas serahan saman dan setelah responden mengaku tidak bersalah terhadap pertuduhan-pertuduhan tersebut, perkara itu telah ditetapkan untuk perbicaraan. Proses ini sama seperti memulakan dan mengendalikan prosiding jenayah. Seksyen 68 Akta tersebut adalah tidak berperlembagaan dan tidak sah kerana menjadi ultra vires terhadap perkara 145(3) Perlembagaan Persekutuan kerana ia bertujuan untuk melindungi seseorang selain daripada Pendakwa Raya, dengan kuasa yang diberikan untuk memulakan dan mengendalikan pendakwaan di bawah Akta tersebut. Oleh itu, pendakwaan yang dibuat menurut s 68 Akta tersebut adalah terbatal dan tidak sah (lihat perenggan 56).

(3) Pindaan-pindaan kepada KAJ oleh Akta A1015 tidak terpakai dalam rayuan ini. Seksyen 11 Akta A1015 jelas menyebut bahawa pindaan-pindaan tersebut tidak terpakai kepada mana-mana pendakwaan yang telah dimulakan tetapi belum diselesaikan pada tarikh bermulanya Akta tersebut. Pengeluaran surat pemberian kuasa daripada timbalan pendakwa raya kepada pegawai KWSP tiada kesan ke atas prosiding kerana prosiding yang dimulakan adalah suatu pembatalan pada permulaannya lagi. Surat pemberian kuasa daripada timbalan pendakwa raya tidak boleh memulihkan apa yang terbatal pada mulanya (lihat perenggan 57).

(4) Majistret yang bijaksana bersetuju bahawa isu-isu yang timbul daripada bantahan awal sebenarnya merupakan persoalan-persoalan berhubung kesan peruntukan-peruntukan Perlembagaan Persekutuan tanpa merujuk kepada s 30 Akta Mahkamah Kehakiman 1964. Meskipun s 30 bukan suatu peruntukan mandatori, peruntukan ini hendaklah sentiasa dirujuk oleh

mahkamah bawahan apabila berhadapan dengan apa-apa persoalan tentang kesan mana-mana peruntukan Perlembagaan Persekutuan (lihat perenggan 59).]

Notes

For cases on conduct of prosecution under the Employment Provident Fund Act 1991 generally, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2924–2929.
For cases on infringement of constitution, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1894–1895.

Cases referred to

Ang Theam Choom v PP [2002] 4 MLJ 401 (refd)
Nguang Chan Sdn Bhd v PP [2001] 2 MLJ 129 (refd)
Pai San & Ors v PP [2002] 4 MLJ 538 (refd)
PP v Dato' Yap Peng [1987] 2 MLJ 311 (refd)
PP v Lee Ming & Anor [1998] 4 MLJ 113 (refd)
PP v Lim Shui Wang [1979] 1 MLJ 65 (refd)
Repco Holdings Bhd v PP [1997] 3 MLJ 681 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 30
Criminal Procedure (Amendment) Act 1998 s 11
Criminal Procedure Code ss 2, 128, 129, 376(1), 377, 380(ii)(b), 418A
Employees Provident Fund Act 1991 ss 43(2), 68
Federal Constitution arts 4(1), 5(1), 121(1), 145(3)
Forests Ordinance (Sarawak Cap 126) ss 86(1),80, 92A
Penal Code s 409
Securities Commission Act 1993 s 39(2)
Securities Industry Act 1983 ss 86, 91, 126(2)
Trade Description Act 1972 ss 3(1)(b), 26, 28B(3)

Appeal from: Criminal Appeal No T(41)–18 of 2001 (High Court, Tawau)

Fazillah Begum Abdul Ghani (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
N Sivabalah (Shearn Delamore & Co) for the respondent.

Mohd Ghazali JCA (delivering judgment of the court):

[1] This is an appeal by the Public Prosecutor against the decision of the learned judicial commissioner, High Court, Tawau who upheld the decision of the learned magistrate wherein she ruled that the institution of criminal proceedings against the respondent for offences under the Employees Provident Fund Act 1991 ('the Act') and the conduct of the prosecution was invalid and consequently had struck off the proceedings.

THE BACKGROUND

[2] On 10 March 1998, an officer from the Employment Provident Fund ('EPF') laid a complaint before the magistrate against the respondent, a locally incorporated company in relation to offences committed by the respondent under s 43(2) of the Act, viz, failure by an employer to pay to the EPF monthly contributions in respect or on behalf of an employee. Section 43(2) of the Act reads:

> Any person being an employer who fails, within such period as may be prescribed by the Board, to pay to the Fund any contributions which he is liable under this Act to pay in respect of or on behalf of any employee in respect of any month shall be guilty of an offence and shall, on conviction, be liable to imprisonment for a term not exceeding three years or to a fine not exceeding ten thousand ringgit or to both.

[3] It would seem that the complaint was made with a view that the magistrate take cognizance of the offences pursuant to s 128 of the Criminal Procedure Code ('CPC') which reads

> 1) Subject to this Code, a Magistrate may take cognizance of an offence —
>
> (a) upon receiving a complaint as defined by this Code;
>
> (b) ...;
>
> (c) ...;
>
> (d) ...;
>
> (2)....

Section 2 of the CPC defines 'complaint' as follows:

> 'complaint' means that allegation made orally or in writing to a Magistrate with a view to his taking action under this Code that some person whether known or unknown has committed or is guilty of an offence;.

[4] Pursuant to the said complaint, a summons was issued by the magistrate on 12 March 1998 and three charges for offences under s 43(2) of the Act were preferred against the respondent. When the summons came up for mention before the magistrate on 12 May 1998 the respondent claimed trial to the three charges.

[5] It would be appropriate to mention here that s 68 of the Act (which was deleted in the year 2000 by virtue of Act A1080) reads:

> Prosecutions in respect of any offence against this Act or of any regulations or rules made thereunder may be conducted by any officer authorized in writing in that behalf by the Chairman.

[6] On 4 March 1999, an EPF officer who was conducting the prosecution of the matter was given a letter of authorization by the deputy public prosecutor pursuant to s 377 of the CPC (as amended by the Criminal Procedure (Amendment) Act 1998 (Act A1015) which came into force on 1 April 1998 ('Act A1015').

[7] Section 377 of the CPC, prior to its amendment, reads:

> Conduct of prosecutions in Court
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> 377. Every criminal prosecution before a High Court and every criminal prosecution for a seizable offence and every inquiry before a Magistrate shall, subject to the following sections, be conducted —
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> (a) by the Public Prosecutor or a Deputy Public Prosecutor, or an advocate or, in the State of Trengganu, a pleader employed by the complainant and expressly authorised in writing by the Public Prosecutor or by a Deputy Public Prosecutor acting under the general control and direction of the Public Prosecutor to conduct such prosecution or inquiry;
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> (b) by a police officer not below the rank of Inspector, acting on behalf of the Public Prosecutor;
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> Provided that in any district in which it may be impracticable, without an unreasonable amount of delay or expense, that such prosecutions or inquiries should be so conducted it shall be lawful for the Public Prosecutor from time to time, by notification in the Gazette, to direct that prosecutions may be conducted in that district by a police officer below the rank of Inspector: and provided further that in the absence from the district of all officers authorised to conduct prosecutions under the foregoing provisions of this section prosecutions may be conducted by a police officer not below the rank of sergeant authorised in writing by the Public Prosecutor to conduct prosecutions for a term not exceeding fourteen days from the date of such written authorisation.

[8] Section 377 of the CPC, after its amendment, reads:

> Conduct of prosecutions in Court
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> 377. Every criminal prosecution before any court and every inquiry before a Magistrate shall, subject to the following sections, be conducted —
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> (a) by the Public Prosecutor, a Senior Deputy Public Prosecutor, a Deputy Public Prosecutor or an Assistant Public Prosecutor;
>
> (b) subject to the control and direction of the Public Prosecutor, by the following persons who are authorized in writing by the Public Prosecutor:
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> (1) an advocate;
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> (2) a police officer not below the rank of Inspector;
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> (3) an officer of any Government department;
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> (4) an officer of any local authority;
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> (5) an officer of any statutory authority or body; or
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> (6) any person employed or retained by any local authority or any statutory authority or body;
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> provided that in any district in which it may be impracticable, without an unreasonable amount of delay or expense, that such prosecutions or inquiries should be so conducted it shall be lawful for the Public Prosecutor from time to time, by notification in the Gazette, to direct that prosecutions may be conducted in that district by a police officer below the rank of Inspector.

[9] At the trial on 15 March 1999, four additional charges under s 43(2) of the Act were preferred against the respondent. The respondent claimed trial to these additional charges. As mentioned earlier, it was an EPF officer who conducted the prosecution of the case, armed with a letter of authorization issued by the deputy public prosecutor dated 4 March 1999. It would be appropriate to mention here that all the charges related to offences under s 43(2) of the Act alleged to have been committed before 1 April 1998, viz., the date of the coming into force of Act A1015.

[10] The trial proceeded for several days and at the close of the prosecution's case the magistrate found that a prima facie case has been made out and hence called upon the respondent to enter on its defence in respect of all the charges. The trial continued again for several days and when the matter came up for submission at the close of the defence case on 28 June 2001, learned counsel for the respondent raised a preliminary objection notice of which was given earlier. The preliminary objection was that the prosecution of the case was ultra vires art 145(3) of the Federal Constitution and was therefore null and void. The objection was based on the premise that officers of the EPF do not have the authority to institute and conduct the proceedings.

[11] As a consequence of the preliminary objection by counsel for the respondent, the learned magistrate directed that written submissions be tendered and on 5 October 2001, she ruled as follows:

> Having considered the arguments, submissions and authorities submitted on points on the related issues by both parties as such I hereby rule that the Prosecution against the defendants (sic) against all seven charges are null and void being ultra vires with the (sic) art 145(3) of the Federal Constitution I must say that (my court are bound by the decision of the Court of Appeal (sic) in the case of *Nguang Chan Sdn Bhd v PP* [2001] 2 MLJ 129).

[12] Her grounds of decision read as follows:

> The issues which I agreed with the defendants (sic) are:
>
> 1 Who institute the proceedings?
>
> 2 Whether institution of proceedings by a party other than the Public Prosecutor is valid (whether s 68 EPF Act is ultra vires the Federal Constitution).
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> By right the person who brought the matter before the Magistrate for cognizance of the offence is the person who initiated the proceedings, but although the magistrate had taken cognizance of the offence the proceedings still cannot be instituted unless and until the Public Prosecutor gives his authorization. The facts of the case shown to court, that the initial proceedings applying section 128 Criminal Procedure Code was brought by an EPF Officer without any authority from the Public Prosecutor.
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> In this case there was totally a lack of authorization by the Public Prosecutor for the institution of all charges against the defendant. Such absence would put my court in no position and jurisdiction at all to firstly take cognizance of the offences under section 128 Criminal Procedure Code and furthermore to hear the charges against the defendant.
>
> I believed consent by the Public Prosecutor in whatever form (sanction, consent or written authority) does prove to be of essential evidence to this court before I can proceed to even take cognizance of the offences. See *PP v Pengurus Mbf Building Service Sdn Bhd* [1998] 1 CLJ at p 683.

> The facts shown to court was that the so called consent by the Public Prosecutor was only given in March 1998 which is after the proceedings had been instituted. In *Justin Milroy Narakera v PP* [1990] 2 CLJ at p 229. It was stated 'all prosecutions under the Criminal Procedure Code are under the control and direction of the Public Prosecutor. It is therefore in his name that criminal proceedings must be initiated'. Such a case the institution of the proceedings without the authority of the Public Prosecutor is not only a breach of art 145... but it goes to the extreme that applying *Nguang Chan*'s case that the lodging of the complaint itself is the institution of the proceedings and such lodging of complaint without the consent whatsoever from the Public Prosecutor would rendered (sic) the proceedings null and void.
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> I do not wished (sic) to elaborate more since the authorities referred to had discussed in depth the issues at hand.
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> On the issue as to whether the conduct of the prosecution was invalid I noted that the proceedings were commenced and instituted on the 10 March 1998 whereas the amendment to s 277 and s 380 only came into force after 1 April 2001 (sic), s 11(1) of Amendment Act 1015 stated inter alia that the amendment would not apply to any prosecution which had been instituted but had not yet been completed on the date of commencement of the act (sic). This in itself explains the position of the case which need no further explanation.
>
> I conclude to say that my court are compelled to follow the decision of the Court of Appeal on the issues mentioned above and that the doctrine of judicial precedent did states that a court other than the Highest Court is obliged generally to follow the decisions of the court at a higher or same level in the court structure subject to certain exceptions affecting especially in the Court of Appeal, see *Dalip Bhagwan Singh v PP* [1998] 1 MLJ 1.

[13] The prosecution appealed. The learned judicial commissioner dismissed the appeal and hence, this appeal.

[14] Before the learned judicial commissioner, the learned deputy public prosecutor argued that the criminal proceedings against the respondent were properly instituted on the basis that the magistrate had taken cognizance of the offence upon receiving a complaint under s 128 of the CPC.

[15] In his grounds of decision, after stating that the issue before him was whether the institution and conduct of the proceedings was a nullity, the learned judicial commissioner said:

> Clearly, the complaint lodged by the officer of the EPF Board preceded the cognisance by the Magistrate of the offence for which the Respondents were charged. It follows, that the complaint itself constitutes the institution of the proceedings against the Respondents and not the cognisance by the Magistrate. The magistrate cannot, therefore, be said to have instituted the proceedings. Suffian, LP in *PP v Lim Shui Wang* [1979] 1 MLJ 65 at p 67 defined the word 'institute' in art 145(3) of the Federal Constitution thus:
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> > The word 'institute'means to set on foot, initiate, start, so that the Attorney-General has power, at his discretion, to initiate a case such as the present ones.

[16] He then referred to several authorities including *Repco Holdings Bhd v Public Prosecutor* [1997] 3 MLJ 681, *Nguang Chan Sdn Bhd v Public Prosecutor* [2001] 2

MLJ 129 and *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311 and also s 380 of the CPC, s 68 of the Act and art 145(3) of the Federal Constitution. A

[17] The learned judicial commissioner concluded that the learned magistrate was correct in ruling that the proceedings against the respondent was null and void and hence dismissed the appeal. B

[18] The issue before this court is whether the institution and/or conduct of the prosecution is valid. It is not disputed that the offences with which the respondent was charged with took place prior to 1 April 1998, viz., the date of the coming into force of Act A1015. C

[19] Article 145(3) of the Federal Constitution intituled 'Attorney General' reads:

> The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court martial. D

[20] Section 376(1) of the CPC intituled 'Public Prosecutor' reads:

> The Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this Code. E

[21] Prior to the coming into force of Act A1015, s 380 of the CPC reads:

> Notwithstanding anything in this Chapter contained —
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> (i) any public officer may prosecute in any court in any case or class of cases in which he is by any written law authorised to prosecute in such Court; F
>
> (ii) in summary non-seizable cases in the court of a Magistrate —
>
> (a) the Public Prosecutor or a Deputy Public Prosecutor or a Police Officer may appear and conduct any prosecution;
>
> (b) any officer of any Government department or of any local authority or statutory authority or any person employed by any local authority or statutory authority may appear and conduct any prosecution for an offence against any written law which it is the duty of the said department or authority specially to enforce; G
>
> (c) any private person may appear in person or by advocate or, in the State of Trengganu, by a pleader and prosecutor for an offence against his own person or property. H

[22] By Act A1015, s 380 of the CPC was amended to read as follows:

> Notwithstanding anything in this Chapter contained, any private person may appear in person or by advocate and prosecute for an offence against his own person or property in a non-seizable case in the Court of a Magistrate. I

[23] Section 11 of Act A1015 which is a saving provision read as follows

A (1) The provisions of this Act shall not apply to any prosecution or proceeding which had been instituted but has not been completed on the date of commencement of the Act.

(2) No finding, judgment, sentence or order of any Court made or passed or imposed before the date of the commencement of this Act or during or at the conclusion of any prosecution or proceeding referred to in subsection (1) shall be reversed, altered or affected by any provision of this Act.

B

[24] Thus, looking at the above provisions of the law, the prosecution's case in instituting these proceedings against the respondent would clearly be governed by s 380(ii)(b) of the CPC prior to its amendment and s 68 of the Act. As mentioned earlier, art 145(3) of the Federal Constitution provides that the Attorney General shall have power exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a court martial. The question which arose was whether s 380(ii)(b) of the CPC and s 68 of the Act were uItra vires or inconsistent with art 145(3) of the Federal Constitution and hence attract art 4(1) of the Federal Constitution which provides that 'This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.'

C

D

[25] In *Repco Holdings Bhd v Public Prosecutor*, the Securities Commission ('SC'), a statutory body, instituted criminal proceedings against Repco Holdings Berhad ('Repco'), a locally incorporated company listed on the local bourse for contravention of s 86 of the Securities Industry Act 1983 ('SIA') and punishable under s 91 of the same. The date of the offence was 27 January 1996. On 21 October 1996 the SC applied for and obtained a summons from the sessions court in Kuala Lumpur against Repco. The case was then fixed for trial on 25 August 1997. On that date, counsel for Repco raised a preliminary objection in relation to the locus standi of two officers of the SC who were the prosecuting officers for the case pursuant to s 126(2) of the SIA and s 39(2) of the Securities Commission Act 1993 ('SCA').

E

F

[26] Section 126 of the SIA reads:

G

(1) No prosecution for any offence under this Act shall be instituted except with the consent in writing of the Public Prosecutor.

(2) A prosecution for any offence against any provision of this Act may be conducted by the Registrar or by any officer authorized in writing by the Registrar or by any officer authorized in writing by the Chairman of the Commission.

H

Section 39 of the SCA reads:

(1) No prosecution for any offence under this Act shall be instituted except with the consent in writing of the Public Prosecutor.

I

(2) Any officer of the Commission authorized in writing by the Chairman may conduct any prosecution of any offence under this Act.

[27] The sessions court judge, faced with the constitutional argument acted under s 30 of the Courts of Judicature Act 1964 and transmitted the case record to the High

Court to determine the constitutionality of the above provisions. Gopal Sri Ram JCA who was the presiding judge in the High Court for the matter noted that sub-s (2) of each of the aforesaid sections vests the conduct of prosecutions under each enactment in the hands of persons other than the Public Prosecutor. It was argued by counsel for Repco that both s 126(2) of the SIA and s 39(2) of the SCA were ultra vires art 145(3) of the Federal Constitution and were void to that extent. At the end of the day the learned judge ruled as follows:

> For the reasons I have given thus far, I would declare s 126(2) of the SIA to be unconstitutional, null and void and of no effect, save to the extent earlier indicated. In the same way, I would declare s 39(2) of the SCA to be unconstitutional, null and void and of no effect.

[28] In his grounds of judgment, in relation to the phrase 'institute, conduct and discontinue' appearing in art 145(3) of the Federal Constitution, Gopal Sri Ram JCA said (at pp 3944–3945):

> It will be seen at once, from a reading of the plain language of art 145(3), that the supreme law, namely the Federal Constitution, has committed to the hands of the Attorney General the sole power, exercisable at his discretion, to institute, conduct and discontinue criminal proceedings. The phrase 'institute, conduct or discontinue' was considered by Abdoolcader J (as he then was) in *Public Prosecutor v Datuk Hj Harun bin Hj Idris & Ors* [1976] 2 MLJ 116. Of the expression "conduct" his Lordship said (at p 119):
>
> > 'Conduct' in art 145(3) cannot but refer to the conduct of prosecutions in court, as it indeed appears *ipsissimis verbis* in s 377 of the Code. And 'control and direction' in s 376(i) of the Code is in respect of all criminal prosecutions and proceedings, and not of criminal procedure or the jurisdiction of the courts.
> >
> > 'Conduct' of criminal prosecutions and proceedings in art 145(3) cannot connote the regulation of criminal procedure or of the jurisdiction of the courts or the power or discretion to do so. Any contrary contention would in effect in my view be tantamount to the suggestion of the Public Prosecutor arrogating to himself the legislative powers vested in Parliament under Item 4 and in particular paragraph (b) thereof List I (Federal List) in the Ninth Schedule to the Constitution, with perhaps also the not inconceptible resultant intrusion or at least a more than peripheral incursion into the sphere of art 121(1) of the Constitution which provides that the judicial power of the Federation is vested in two High Courts and in such inferior courts as may be provided by federal law namely, the Subordinate Courts Act 1948 which specifies the subordinate courts and their respective civil and criminal jurisdiction.
> >
> > Pursuing its signification, 'to conduct' means 'to lead, guide, manage' (*In re Bhupalli Malliah* AIR 1959 AP 477; *Pride of Derby v British Celanese Ltd* [1953] 1 Ch 149, at p 167 per Lord Evershed MR). It conveys the idea of leading and guiding, that is to say, the person who conducts the prosecution determines all important questions of policy involved in the courts of the trial and the attitude to be adopted by the prosecution towards material objections raised or demands made by the accused with respect to the evidence.
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> Abdoolcader J's interpretation of the phrase 'institute, conduct or discontinue' was approved and applied by the Federal Court in *Public Prosecutor v Lim Shui Wang & Ors* [1979] 1 MLJ 65.
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> It follows from the foregoing discussion that the only authority that is constitutionally entitled to conduct prosecutions is the Attorney General as Public Prosecutor. The adjectival

vehicle contained in s 376 and subsequent sections of the Criminal Procedure Code put this beyond doubt. The question then arises: is Parliament entitled by written law to vest the power to conduct criminal prosecutions in an authority other than the Attorney General?

[29] Gopal Sri Ram JCA was of the view that s 126(2) of the SIA, to a certain extent, and s 39(2) of the SCA 'do indeed conflict' with art 145(3) of the Federal Consitution. He then said as follows (at p 3948):

> In my judgment, having regard to the authorities read before me, the expression 'conduct' appearing in art 145(3) and in the two impugned subsections carries the same meaning. Since the Constitution exclusively authorises the Attorney General to conduct prosecutions, it must follow, as night follows day, that no other authority may be lawfully empowered to exercise that function. Therefore, it is my opinion, that s 126(2) of the SIA is ultra vires Article 145(3) of the Federal Constitution save to the extent I shall now indicate.
>
> Subsection (2) of s 126 of the SIA refers to the conducting of a prosecution by the Registrar of Companies or by someone authorised by such Registrar in writing. As a matter of practice, the Registrar of Companies is a senior member of the Judicial and Legal Service. He or she is normally gazetted as a Deputy Public Prosecutor. So, if the Registrar of Companies is a gazetted Deputy Public Prosecutor and in such capacity conducts the prosecution of an offence under the SIA, that would not be caught by art 145(3) of the Constitution. But the Chairman of the Securities Commission is not placed on an equal footing. He is therefore not authorised lawfully, that is to say constitutionally, to authorise or to conduct prosecutions under the SIA.
>
> Neither does s 380(i) of the Criminal Procedure Code, relied on by the prosecutors before the Sessions Court, provide any assistance to the Securities Commission. As pointed out by the learned Deputy, the expression 'public officer' appearing in that section refers to members of the public service. While, for the purpose of carrying out their duties, members and servants of the Securities Commission are deemed to be public servants (s 40 of the SCA), they do not fall within the scope of s 380(i) of the Code.

[30] In *Public Prosecutor v Lee Ming & Anor* [1998] 4 MLJ 113 the High Court was moved by the Public Prosecutor to revise a decision of the sessions court judge who had ruled that the prosecution officer, a legal officer of the Sarawak State Attorney General Chambers, had no written authorization to prosecute Lee Ming and Syarikat Stungkor Butan on two of three charges. The two charges were respectively under ss 86(1) and 80 of the Forests Ordinance (Sarawak Cap 126). The trial in respect of the two charges ended when at the close of the case for the prosecution the court declared the trial a nullity. What was relied on by the prosecution officer as constituting written authority for him to prosecute was a letter dated 18 May 1996 that was signed on behalf of the Director of Forests, Sarawak. It was argued in the sessions court by the prosecution that the prosecution officer had valid authorization under s 92A of the Forests Ordinancev in the form of the said written authority. Section 92A of the Forests Ordinance reads:

> Prosecution in respect of offences under this Ordinance or by any subsidiary legislation trade hereunder may be conducted by —
>
> (a) The State Attorney General or any legally qualified officer authorized by him;
>
> (b) The Director; or

(c) any forest officer or any other public officer generally or specially authorized in that behalf by the Director.

[31] In relation to the above, the learned judge of the High Court, Ian Chin J said (at p 117):

> That provision is surely, in the light of *Repco Holdings Bhd v PP* [1997] 3 MLJ 681, which I respectfully follow, unconstitutional, null and void as it allows persons other than the Federal Attorney General to institute, conduct or discontinue any proceedings for an offence. Therefore, whatever the nature of the authorization that was given pursuant to that provision did not clothe the prosecution officer with authority to prosecute. In this regard, the learned sessions court judge was right in concluding that the prosecution was a nullity.
>
> This brings me to the third charge which is under s 22(2) of the Sarawak Wild Life Protection Ordinance. The offence was for being in possession of a protected plant which carries a sentence of imprisonment of one year and a fine of RM25,000. The provision enabling prosecution in that Ordinance is in the following section:
>
> > 39. Prosecutions in respect of offences committed under this Ordinance or any rule made hereunder may be conducted by a Wild Life Officer, or by any other person specially authorized in writing in that behalf by the Director.
>
> In my view, that provision suffers the same unconstitutionality and nullity because it vested prosecutorial authority on a person other than the Federal Attorney General and without the Federal Attorney General having any discretion in the institution, conduct or discontinuance of the proceedings under the Sarawak Wild Life Protection Ordinance.

[32] Further on in his grounds of judgment, Ian Chin J said (at pp 119–120):

> Any provision which attempts to clothe any person other than the Federal Attorney General with the power to institute, conduct or discontinue any prosecution for an offence must necessarily fall foul of art 145(3). In this regard, s 380(ii)(b) which the prosecution relies on as allowing the prosecution officer to prosecute must be examined to see whether it falls foul of art 145(3). It is clear from the wording of s 380(ii)(b), which I have earlier reproduced, that the conduct of prosecution was taken totally out of the hands of the Federal Attorney General and vested in officers of Government department, local authority or statutory authority and there is not even a need to obtain sanction to prosecute from the Attorney General. It must follow from the decision of *Repco Holdings Bhd v PP* that s 380(ii)(b) is also unconstitutional and a nullity. Not only that, every legislation, be it State or Federal, which attempts to clothe any person other than the Federal Attorney General with the power to institute, conduct or discontinue any prosecution for an offence would also be unconstitutional and a nullity.

[33] In *Nguang Chan Sdn Bhd v PP*, which relates to two appeals, the appellant in the first appeal, a locally incorporated company was charged in the magistrate court with two charges for offences under s 3(1)(b) of the Trade Description Act 1972 ('the TDA'). Prosecution was carried out by an Assistant Controller of Trade Descriptions ('the Assistant Controller') who appeared to derive his power from s 28B(3) of the TDA. The magistrate transmitted the record of proceedings to the High Court for the determination of two constitutional matters, namely:

(a) whether s 28B(3) of the TDA is ultra vires art 145(3) of the Federal Constitution; and

(b) whether the institution of proceedings contravened art 145(3) of the Federal Constitution.

[34] Section 28B(3) of the TDA reads:

(3) Any prosecution in respect of an offence under this Act may be conducted by an Assistant Controller.

Section 26 of the TDA reads:

(1)...;

(2) The Controller shall subject to the general direction and control of the Minister have supervision in all matters relating to the enforcement of this Act and the Controller and the Deputy Controller shall perform such duties and exercise such powers and functions conferred upon him and upon an Assistant Controller by this Act.

(3) All officers appointed under this section shall be deemed to be public servants within the meaning of the Penal Code applicable.

[35] The High Court, following *Repco Holdings Bhd v PP* held that s 28B(3) of the TDA is ultra vires art 145(3) of the Federal Constitution. However, the High Court went on to hold that as the summons against the appellant was issued under Chapter XV of the CPC following a written complaint by the Assistant Controller, the institution of proceedings did not contravene art 145(3) of the Federal Constitution, as the Assistant Controller, being a public officer, was presumed to be acting under the direction and control of the Public Prosecutor. Both the appellant and the Public Prosecutor appealed to this court. The issues before this court were as follows:

(a) whether s 28B(3) of the Act is ultra vires art 145(3) of the Federal Constitution; and

(b) whether the institution of proceedings were in contravention of art 145(3) of the Federal Constitution and therefore null and void.

[36] This court held that s 28B(3) of the TDA was ultra vires art 145(3) of the Federal Constitution. This court was also of the view that the purpose of s 380(ii)(b) of the CPC (before its amendment) was to lessen the burden of the Attorney General from dealing with day-to-day matters that could be dealt with by respective departments of local and statutory authorities, but the powers of these authorities should still be subject to the powers of the Attorney General. This court also held that there was no avenue for a presumption to operate in this case and that the prosecution conducted by the Assistant Controller was null and void.

[37] In delivering the judgment of this court in *Nguang Chan Sdn Bhd v PP*, Lamin PCA said (at pp 134–135):

Under s 380(ii)(b), any officer of the Government department or any local authority or statutory authority or any person employed by any of them is authorised to appear and conduct any prosecution for an offence 'against any written law which it is the duty of the said department or authority specially to enforce". This subsection was inserted in 1967

(s 18 of the CPC Amendment Act 25/67). We believe it was initiated to ease the heavy burden of the Attorney-General and his officers and to allow the officers of the respective government departments and statutory authorities to conduct the prosecution of minor offences (non-seizable) against their relevant laws. The constitutional validity of this provision is questionable especially when the section (s 380) is prefixed with the words 'Notwithstanding anything in this Chapter contained...'. The effect of this is to oust the powers of the Attorney-General under s 376(i) to control and direct all criminal prosecutions. Perhaps this is permissible. But more importantly it stands in the face of his general powers under art 145(3) Constitution and will immediately attract art 4(1) of the Constitution. In April 1998 under the Amendment Act A1015 the whole s 380 was completely amended and replaced with a new s 380 which reads:

> 380. Notwithstanding anything in this Chapter contained, any private person may appear in person or by advocate and prosecute for an offence against his own person or property in a non-seizable case in the Court of a Magistrate.

This new s 380 requires no further discussion as it has become irrelevant in the context of the present case. However in the same Amendment Act 1998 s 377 was amended by substituting for paragraphs (a) and (b), completely new paragraphs (a) and (b). The new paragraph (b) is, in our view, constitutionally palatable because the person named therein such as officer of any Government department, an officer of any local or statutory authority and any person employed by them may conduct prosecution but must be authorised in writing by the Public Prosecutor and while still remaining under his control and direction. Paragraph (b) reads:

> (b) subject to the control and direction of the Public Prosecutor, by the following persons who are authorised in writing by the Public Prosecutor:
>
> (1) an advocate;
>
> (2) a police officer not below the rank of Inspector;
>
> (3) an officer of any Government department;
>
> (4) an officer of any local authority;
>
> (5) an officer of any statutory authority or body; or
>
> (6) any person employed or retained by any local authority or any statutory authority or body.

With this new paragraph (b), it emphasises further the position of the Attorney-General as regards his overall authority 'to institute, conduct or discontinue' any proceedings for an offence exercisable at his discretion. In our view whether with or without the 1998 amendment, the powers of the Attorney-General under art 145(3) of the Federal Constitution remains unaffected.

[38] In relation to the holding of the High Court that the institution of proceedings did not contravene art 145(3) of the Federal Constitution as the Assistant Controller, being a public officer, was presumed to be acting under the direction and control of the Public Prosecutor, Lamin PCA said (at pp 140–142):

> There is just another matter. The learned judge in the present case in his grounds of judgment (reported in [2000] 4 AMR 3927 at p 3933) did said this:
>
> I now move to the second question, whether the institution by the Assistant Controller of Trade Descriptions of proceedings under the Act contravenes art 145(3). The short

A answer to this is, if the Assistant Controller of Trade Descriptions was the person who took the initiative to institute the proceedings, then the proceedings are a nullity.

But did he institute the proceedings? The record shows that a magistrate issued a summons on February 10,1995 in respect of the charges for the two offences against the accused company. It was issued on a written complaint lodged by a public servant, in this case Assistant Controller of Trade Descriptions, Mohd Rabani Hj Sayur. The summons was issued under Chapter XV of the CPC.

In the present case, the judge did not view it as a case being 'instituted' by a public servant who was the Assistant Controller of Trade Descriptions otherwise as he had said the proceedings would have been a nullity. To him, the case emerged into court as a result of a written complaint lodged by the Assistant Controller of Trade Descriptions, Mohd Rabani Hj Sayur and then a summons was issued by a Magistrate under Chapter XV of the CPC. Since the complaint was lodged by a public servant and not by a private person then subsection (1) of s 133 CPC before the amendment did not apply so that his complaint need not be examined on oath before the issuance of the summons for he said:

It was not necessary to examine the officer acting in his official capacity as the complaint was made on an official basis and the presumption was that the complaint made under the CPC was made by an officer under the control and direction of the Federal Attorney General acting as Public Prosecutor consonant with art 145 and s 376(1) of the CPC.

To the learned judge since the complaint was made by a public officer in his official capacity and (sic) it was not necessary for the magistrate to examine him on oath and in such a case a presumption could arise in that the complaint was made by an officer under 'the control and direction' of the Federal Attorney-General acting as a Public Prosecutor consonant with art 145 and s 376(i) of the CPC. For one thing it is not clear in the mind of the judge whether by 'lodging' a complaint it could or could not amount to 'instituting' a proceeding. Be that as it may in our own view, with the greatest of respect we see no avenue for a presumption to operate here. In the present case, it was clear that the prosecution was conducted by an Assistant Controller of Trade Descriptions and he had his purported authority to do so under s 28B(3) of Act 87 and as we have said it was clearly in contravention of art 145(3) of the Federal Constitution. So the prosecution was a nullity. There was no way that he could hide under or get the protection of s 376(i) in view of what we said of the effect of s 380 of the CPC before the 1998 amendment.

That is all that is required to be said about the proceedings. However by lodging a complaint as was done by the Assistant Controller, did not help to salvage the case in any way. By so doing it could be said he did institute the proceeding. However whatever action he took he would still be under the 'supervision' of the Controller [s 26(2)] which would be 'subject to the general direction and control of the Minister' and therefore in direct conflict with art 145(3) and to that extent the said provision would be struck down as null and void [Article 4(1)].

In the circumstances we therefore rule that s 28B(3) of Act 87 is ultra vires of art 145(3) of the Federal Constitution and that the prosecution conducted was null and void.

[39] This court had earlier in the above judgment also made the following observation in relation to s 28B(3) of the TDA and s 26 of the same, reproduced earlier. This was what Lamin PCA said (at p 1255):

There is nothing to suggest from s 28B(3) of the Trade Descriptions Act 1972 that the Assistant Controller when acting under subsection (3) that he is obliged to get either written

authorisation or consent from the Attorney-General or any Deputy Public Prosecutor. It appears he is allowed to act independently. However he is under general 'supervision' by the Controller who in turn the Controller himself is under 'the general direction and control of the Minister' when performing his functions such as supervising 'in all matters relating to the enforcement of this Act.' [See s 26(2)].

[40] The observation above would equally apply in the instant appeal. Armed with an authorization in writing by the Chairman of the EPF, pursuant to s 68 of the Act (prior to its deletion in the year 2000 by Act A1080) and read together with s 128 of the CPC, it would seem that an EPF officer was allowed to act independently of the Public Prosecutor to conduct prosecutions in respect of any offences against the Act.

[41] In canvassing the appeal before us, the learned deputy public prosecutor argued that 'to institute' a proceeding should be distinguished from 'to conduct' a proceeding. She then referred to *Public Prosecutor v Lim Shui Wang* [1979] 1 MLJ 65 where Suffian LP said (at p 67):

In our view the words 'institute, conduct' in art 145(3) are wide enough to confer on the Attorney-General unfettered discretion to choose in which court, a higher or lower court, to bring persons charged under s 39B(1)(a) of the Dangerous Drugs Ordinance, though of course he does not have nor is it contended that he has, power to choose which particular judge or president should actually try the case. The word 'institute' means to set on foot, initiate, start, so that the Attorney-General has power, at his discretion, to initiate a case such as the present ones, before a Special President or a High Court judge. We respectfully agree with Abdoolcader J when he said at p 119 in *Public Prosecutor v Datuk Harun bin Haji Idris* [1976] 2 MLJ 116, p 119:

> 'Institute' in art 145(3) … must necessarily refer to the commencement of proceedings and prosecutions…. It may well be …that the Public Prosecutor has power … to direct any case triable in the Magistrate's or Sessions Court to be tried in the High Court after a preliminary enquiry. This power to so direct would, if exercised, fall squarely within his discretion to institute and conduct criminal prosecutions and proceedings.

[42] The learned deputy public prosecutor then pointed out that in the instant appeal, as there is already a complaint before the court and the respondent having submitted itself to the jurisdiction of the court, the institution of the proceeding is complete. In support of this, she referred to *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311 at p 323 where Mohamed Azmi SCJ said:

The power of a Magistrate or President Session Court to take cognizance of an offence is governed by s 128 CPC. When the respondent was brought before the Sessions Court on the two charges s 409 Penal Code (which offences the President had jurisdiction to try without sanction under s 129 CPC even if the respondent had appeared before the court on a complaint of a person other than the Public Prosecutor), the normal legal position was that once the court had taken cognizance of the offence and was seized with jurisdiction to try the case, the institution of the proceedings by the Public Prosecutor was complete, because not only had the Public Prosecutor successful (sic) invited the court to take action, but also it was the scheme of the Criminal Procedure Code that trial follows cognizance and cognizance would be preceded by investigation. Criminal proceedings are in fact not

instituted until the court has taken cognizance of the offence or offences under one or other of the clauses of subsection (1) of s 128 CPC. (see *Sohoni Criminal Procedure Code* (18th Ed) Vol 3 p 1885).

[43] The learned deputy public prosecutor consequently submitted the above decision clearly shows that for cases not requiring sanction by the Public Prosecutor, there is nothing to stop the court from taking cognizance of the offence which in fact the court is entitled to do by virtue of s 128 of the CPC. She argued that the institution of the proceedings in the instant appeal was complete when the magistrate had taken all the following steps:

(i) issuing a summons to the respondent;

(ii) parties had appeared before the court; and

(iii) the trial had proceeded with the prosecution calling their first witness (in the present case the trial had proceeded up to the case for the defence).

[44] In relation to s 68 of the Act, she argued that that provision merely deals with the conduct of prosecution and not institution of proceedings and that 'institution' must be distinguished from 'conduct' of proceedings. She submitted that it is therefore manifestly clear that the scheme for institution of proceedings in the instant appeal was based on the provisions of the CPC and hence the judicial commissioner fell into error when he ruled that 'there is no doubt that the proceedings against the respondents (sic) was instituted and conducted by the Officers of the EPF Board and founded on s 68'.

[45] The learned deputy public prosecutor then went on to argue that the prosecuting officer from the EPF derives its authority to conduct the prosecution not from s 68 of the Act (prior to its deletion) but from the letter of authorization issued by the deputy public prosecutor dated 4 March 1999 and it was issued by virtue of s 377(b) of the CPC.

[46] She then referred to *Ang Theam Choom v Public Prosecutor* [2002] 4 MLJ 401 where this court held that so long as the authority to conduct the prosecution is given before the trial began, it should be sufficient as it was at that trial stage that one really 'conduct"' the prosecution. In *Ang Theam Choom v Public Prosecutor*, in delivering the decision of this court, Abdul Hamid Mohamad JCA (as he then was) said (at p 409):

> In our view, the prosecution cannot be instituted unless the consent or sanction is given (in the case of sanction, subject to s 422(b)). But, in the present case, it is the authority to conduct the prosecution that is in issue. In our view, so long as it is given, in this case, before the trial began, it should be sufficient. It is at the trial stage that one really 'conducts' the prosecution.

and at p 410:

> Perhaps we may add that 'to institute' a proceeding should be distinguished from 'to conduct' a proceeding. Institution is the earlier stage while 'conducting' is the later stage,

more properly refers to the trial stage. In this case, as the prosecuting officer was in fact given the authority to conduct the prosecution of the appellant, he had the authority to do so. A

[47] In conclusion the learned deputy public prosecutor prayed that the appeal be allowed and the matter be remitted back to the magistrate court for continued hearing. B

[48] In her submission the learned deputy public prosecutor referred to the judgment of Mohamed Azmi SCJ in *Public Prosecutor v Dato' Yap Peng* and argued that that part of the judgment showed that for cases not requiring sanction of the Public Prosecutor there is nothing to stop the court from taking cognizance of the offence which in fact the court is entitled to do so by virtue of s 128 of the CPC and hence the institution of the proceedings in the instant appeal was complete when the magistrate had taken all the steps by issuing the summons and the trial had proceeded until the stage of the case for the defence. With respect to the learned deputy public prosecutor, that was not the real issue before the Supreme Court. Mohamed Azmi SCJ was only explaining that pursuant to s 128 of the CPC court proceedings 'are in fact not instituted until the court has taken cognizance of the offence or offences under one of the clauses of sub-s (1) of s 128 CPC'. C D

[49] In *Public Prosecutor v Dato' Yap Peng* the respondent had been charged in the sessions court with two charges of criminal breach of trust under s 409 of the Penal Code to which he claimed trial. When his case came for mention again in the sessions court, the deputy public prosecutor tendered a certificate under s 418A of the CPC requiring the case to be removed to the High Court and this was complied with. Section 418A (which has subsequently been amended) read: E

> (1) Notwithstanding the provisions of s 417, the Public Prosecutor may in any particular case triable by a criminal Court subordinate to the High Court issue a certificate requiring the Court before which the case is pending to remove it to the High Court at such place as may be specified in the certificate and to cause the accused person to appear or be produced before the said High Court. F
>
> (2) The power of the Public Prosecutor under subsection (1) shall be exercised by him personally. G
>
> (3) Upon receipt of the certificate, the Court before which the case is triable shall without holding a preliminary inquiry under Chapter XVII transmit the case to the High Court mentioned in the certificate and cause the accused person to appear or be brought before such High Court as soon as may be practicable; and thereafter the provisions of subsection (3)(b) and subsection (4) of s 417 shall apply to such case mutatis mutandis. H

[50] In the High Court, objection was taken on the accused's behalf to the transfer of the case from the sessions court on a challenge mounted against the constitutional validity of s 418A of the CPC on the basis that it infringes arts 121(1) and 5(1) of the Federal Constitution. Article 121 deals with the two High Courts in Malaysia and art 5(1) provides that 'No person shall be deprived of his life or personal liberty I

save in accordance with law'. Zakaria Yatim J (as he was then) held s 418A of the CPC to be unconstitutional and void in that it is inconsistent with art 121(1) of the Federal Constitution and that the certificate issued by the Public Prosecutor thereunder was accordingly invalid and of no effect and ordered that the case be remitted to the sessions court for trial.

[51] On appeal, the Supreme Court (in a majority judgment) held, inter alia, that s 418A of the CPC is unconstitutional and void as being an infringement of the provisions of art 121(1) of the Federal Constitution. In his judgment, Mohamed Azmi SCJ said (at p 323):

> ... the fact that s 418A enables a case to be transferred by the Public Prosecutor at any time before the conclusion of the trial is clearly an interference with judicial power to adjudicate disputes.

What Mohamed Azmi SCJ said subsequently, which was in relation to s 128 and 129 of the CPC, has been reproduced earlier. Mohamed Azmi SCJ then went on to say as follows (at pp 323–324):

> Accordingly, once a court is seised with jurisdiction by taking cognisance of any offence under s 128 CPC, a host of judicial powers will flow to enable the court to proceed to trial and determine the dispute between the parties in accordance with law. In general, the court taking cognisance of the offence, is the dividing line between the sphere and domain of the executive and the judiciary, for cognisance by the court signals the submission of the executive to the jurisdiction of the court and marks the completion of the exercise of executive power to 'institute' the criminal proceedings. From then on, the whole conduct of the proceedings should be within the exclusive judicial power of the court until its conclusion. The question is, to what extent the provision of art 145(3) has altered the general rule? That Article refers to 'power … to institute, conduct or discontinue any proceedings for an offence …' exercisable at the discretion of the Attorney-General, who by virtue of s 376(i) CPC is also the Public Prosecutor. Since judicial power of the Federation is vested in the courts, I am of the view that it is manifestly clear the power referred to in art 145(3) must only relate to the prosecution and not the trial of criminal proceedings. Any other interpretation would make a mockery of the well established concept of judicial independence to determine disputes. Once the trial has commenced before a court of competent jurisdiction, the Public Prosecutor must be taken to have exercised his choice of venue, and it is unthinkable that he can be given an unfettered power to change the venue without giving the accused person an opportunity to be heard. When that choice has been exercised and the matter is before the court, consistent with our adversary system of criminal justice, the status of the Public Prosecutor or any of his officers as a client of the court, is the same as the counsel for the accused as far as the court is concerned when conducting a trial. Once the trial has commenced, any legislation conferring him as a member of the executive, power which goes further than to 'institute, conduct or discontinue' prosecution in any criminal proceedings would be suspect, and if it constitutes an interference or even a risk of an interference with any judicial power of the court, it must be struck down as being in violation of art 121 of the Constitution. On Merdeka Day s 417 recognises the principle that the power to transfer a case at any stage before its conclusion before a court of competent jurisdiction is a judicial power, and that such power can only be exercised on some defined basis to ensure that a case is a proper one to be transferred from a subordinate court to the High Court. The adjudication of such matter in compliance with the rule of law and the rule of natural justice must surely be left entirely in the hands of the judiciary.

Section 418A clearly confers judicial power on a body which is not a court and as such it is an interference of judicial power of the Federation as enshrined in art 121 of the Consitution. The most objectional aspect of s 418A is that if in the course of a trial the Public Prosecutor fails to convince the High Court in his application under s 417 that a case is a proper one to be transferred for any of the reasons allowed for transfer, he is empowered under s 418A to practically ignore the High Court's decision and achieve the transfer of the case by issuing a certificate signed by him personally under that impugned section requiring the subordinate court before which the case is pending to remove it to the High Court without assigning any reason and without giving the accused any opportunity to be heard. It is axiomatic that the court does not act in vain, yet that is the extent of the judicial power given by s 418A to the executive. The Bill to Act A324 which amended the Criminal Procedure Code, did not state the objects and reasons for introducing the impugned s 418A. Encik Mohtar has volunteered to furnish them from the Bar by saying that the new section is necessary to enable the Public Prosecutor to choose the High Court as his forum for trial without the necessity to hold a preliminary inquiry under s 138 CPC. But surely, such enabling provision can be made without violating the provision of art 121. Indeed Parliament can even legislate to abolish preliminary inquiries altogether as has been done in some common law jurisdictions. In the circumstances, I am not persuaded by the argument that s 418A is merely a vehicle by which the Public Prosecutor can choose his forum. Clearly, judicial power to transfer cases from a subordinate court of competent jurisdiction as presently provided by s 418A cannot be conferred on any organ of government other than the judiciary. The submission that the exercise of such power in an unreasonable manner by the Attorney-General has not arisen, is no argument when dealing with the constitutionality of any legislation under which the power is exercised. As correctly pointed out by Mr Sri Ram for the respondent, the court here is dealing with the power and not the exercise of it. In this appeal, I am only concerned with two issues —

first, whether s 418A vests any judicial power in the Attorney-General, and second, if so whether such vesting of judicial power violates the Federal Constitution. My answers to both questions are in the positive.

Zakaria Yatim J is correct in his conclusion that s 418A Criminal Procedure Code violates art 121 Federal Constitution and it is therefore void by virtue of art 4(1). I would therefore dismiss this appeal. As already pronounced by the court at the conclusion of this appeal, I agree that the principle of prospective overruling be applied in this case.

[52] In relation to the general principle of retroactivity of a judicial declaration of invalidity of a law, Abdoolcader SCJ in a separate judgment in *Public Prosecutor v Dato' Yap Peng* said (at p 320):

The doctrine — to the effect that when a statute is held to be unconstitutional, after overruling a long-standing current of decisions to the contrary, the Court will not give retrospective effect to the declaration of unconstitutionality so as to set aside proceedings of convictions or acquittals which had taken place under that statute prior to the date of the judgment which declared it to be unconstitutional, and convictions or acquittals secured as a result of the application of the impugned statute previously will accordingly not be disturbed — can be applied by the Supreme Court as the highest court of the country in a matter arising under the Constitution to give such retroactive effect to its decision as it thinks fit to be moulded in accordance with the justice of the cause or matter before it — to be adhibited however with circumspection and as an exceptional measure in the light of the circumstances under consideration.

[53] The above were the issues that were determined by the Supreme Court in *Public Prosecutor v Dato' Yap Peng*. The Supreme Court clearly did not hold that for cases not requiring sanction of the Public Prosecutor there is nothing to stop the court from taking cognizance of the offence by virtue of s 128 of the CPC and after a summons has been issued, it would not be open to an accused person to challenge the exercise of the power by the prosecution under whichever provision of the relevant laws in issue, if that was what was in the mind of the learned deputy public prosecutor when she referred to that part of the decision of Mohamed Azmi SCJ.

[54] It is clear that the prosecution's authority to institute and conduct the proceedings against the respondent in the magistrate court in the instant appeal were governed by s 380(ii)(b) of the CPC prior to its amendment by Act A1015 and s 68 of the Act prior to its deletion by Act A1080. The courts below were of the view that these two provisions were ultra vires or inconsistent with art 145(3) of the Federal Constitution and hence, by virtue of art 4(1) of the Federal Constitution were void to the extent of their inconsistency. We agree. As such, we would also agree with the courts below that the proceedings instituted and conducted by the EPF in the magistrate court was null and void.

[55] It has been held in the authorities referred to above that s 380(ii)(b) of the CPC prior to its amendment is ultra vires the Federal Constitution and we see no reason to depart from that holding. In *Pai San & Ors v Public Prosecutor* [2002] 4 MLJ 538, Abdul Hamid Mohamad JCA, in delivering the judgment of this court, made reference to several authorities including *Nguang Chan Sdn Bhd v Pendakwa Raya* and *Repco Holdings Bhd v PP*; he said (at p 556):

> In our view, the judgments of the courts have been quite consistent. A provision giving the power to institute, conduct or discontinue a proceeding for an offence is unconstitutional and void if it is exercisable independently of, or if it is parallel to the powers vested in the Public Prosecutor by art 145(3) of the Federal Constitution. Any authorization given pursuant to such (void) provision is void and the prosecution instituted and conducted by a person so authorized is void. However, so long as the power given to another person is subject to the powers of the Public Prosecutor under art 145(3) of the Federal Constitution, it is valid.

[56] In the instant appeal the facts showed that the officer from the EPF laid a complaint before the magistrate. Upon taking cognizance of the offences under the Act, the magistrate issued a summons on 12 March 1998 and consequently, after service of the summons and upon the respondent pleading not guilty to the charges, the matter was fixed for trial. We are of the view that this process was tantamount to instituting and conducting criminal proceedings. The entity which gave power to the EPF officer to proceed as such would be the Chairman of the EPF pursuant to s 68 of the Act (prior to its deletion by Act A1080). In following *Repco Holdings Bhd v PP* and *Nguang Chan Sdn Bhd v PP* and the other authorities referred to above, it would be our view that s 68 of the Act would be unconstitutional and invalid as being ultra vires art 145(3) of the Federal Constitution as it purports to clothe the person other than the Public Prosecutor, with the power to authorize the institution and conduct

of prosecution under the Act. Thus, the prosecution made pursuant to s 68 of the Act is therefore null and void. A

[57] The prosecution argued that the validity of the conduct of the prosecution is academic in view of the amendment of s 377 of the CPC by Act A1015 which came into force on 1 April 1998. It was their contention that since the authorization under the amended s 377 of the CPC was issued on 4 March 1999, ie, before the commencement of the trial, the conduct of the prosecution by the EPF officers was valid. We do not agree. The amendments to the CPC by Act A1015 cannot apply in the instant appeal before us. Section 11 of Act A1015 clearly states that the amendments would not apply to any prosecution which had been instituted but had not yet been completed on the date of commencement of the Act, viz., 1 April 1998. The issuance of the letter of authorization from the deputy public prosecutor dated 4 March 1999 to the EPF officer who was the prosecuting officer has no bearing upon the proceedings as the institution of proceedings was a nullity at the outset. Further, the amendments to Act A1015 were not couched in terms which would make it retrospective in operation. As such, the letter of authorization from the deputy public prosecutor cannot regularise what was a nullity at the outset. Thus, s 377 and also s 380 as amended by Act A1015 would only apply to criminal proceedings commenced or instituted after 1 April 1998. B C D

[58] In conclusion, we reiterate our views that the institution of criminal proceedings in the instant appeal was clearly null and void. We are of the unanimous view that the learned magistrate was correct in ruling that the institution and prosecution of the charges against the respondent was null and void. Similarly, the learned judicial commissioner was correct in upholding the learned magistrate's decision and dismissing the prosecution's appeal. For the reasons aforesaid, we unanimously dismiss this appeal. E F

[59] Incidentally, we noted that the learned magistrate decided upon herself the issues arising from the preliminary objection which are actually questions as to the effect of provisions of the Federal Constitution without resorting to s 30 of the Courts of Judicature Act 1964 unlike what the learned sessions court judge did in *Repco Holdings Bhd v PP*; s 30 intituled 'Reference of constitutional question by the subordinate court' reads: G

> (1) Where in any proceedings in any subordinate court any question arises as to the effect of any provision of the Constitution the presiding officer of the court may stay the proceedings and may transmit the record thereof to the High Court. H
>
> (2) Any record of proceedings transmitted to the High Court under this section shall be examined by a Judge of the Court and where the Judge considers that the decision of a question as to the effect of the Constitution is necessary for the determination of the proceedings he shall deal with the case in accordance with s 84 as if it were a case before him in the original jurisdiction of the High Court in which the question had arisen. I
>
> (3) Subsection (1) and (2) shall be deemed to be rules of court for the purposes of art 128(2) of the Constitution.

[60] Although s 30 does not seem to be a mandatory provision, we would think that this provision should always be resorted to by subordinate courts when faced with any question as to the effect of any provision of the Federal Constitution.

Appeal dismissed.

Reported by Brendan Navin Siva